

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RULE 72(a) OBJECTION TO MAGISTRATE
JUDGE JOYNER'S FEBRUARY 1, 2008 OPINION AND ORDER [DKT #1502]**

Preliminary Injunction Related -- Expedited Consideration Requested

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), pursuant to Fed. R. Civ. P. 72(a), respectfully objects to Magistrate Judge Joyner's February 1, 2008 Opinion and Order ("Order") [DKT #1502] which denied the State's request to take depositions of Defendants' preliminary injunction expert witnesses. This Order is clearly erroneous because it misconstrued this Court's remarks at the December 7, 2007 hearing and failed to take into account that there is sufficient time for these depositions to occur. This Order should therefore be reversed, and the State should be permitted to depose Defendants' preliminary injunction expert witnesses.

I. Argument

A. The Magistrate Judge misconstrued this Court's remarks at the December 7, 2007 hearing

The Magistrate Judge denied the State's request to take depositions of Defendants' preliminary injunction expert witnesses based upon an erroneous reading of this Court's remarks

at the December 7, 2007 hearing. In setting the preliminary injunction hearing for late February, the Court stated: ". . . I anticipate that [Defendants are] going to be taking depositions up to . . . the first day of the hearing given the type time frame the plaintiffs have asked for." Dec. 7, 2007 Transcript, 48:15-20. Accordingly, the Court concluded that ". . . it would seem to me that as a practical matter that the plaintiffs would not have an opportunity to depose defendants' experts before the preliminary injunction hearing" Dec. 7, 2007 Transcript, 42:25-43:3 (emphasis added). As a result of the State's diligence in producing its expert witnesses for deposition, however, the Court's concern that depositions of the State's expert witnesses would continue up to the first day of the hearing has not come to fruition. In fact, the last deposition of the State's expert witnesses is set for February 5 -- some two weeks before the start of the preliminary injunction hearing. Moreover, there are no depositions currently set for either the week of February 11 or the week of February 25. Therefore, it turns out that, as a practical matter, there is sufficient time for depositions of Defendants' expert witnesses to occur. Accordingly, the State sought the depositions of Defendants' expert witnesses beginning on February 12. *See* DKT #1465. Defendants objected. *See* DKT #1478. Following a January 30, 2008 hearing, Magistrate Judge Joyner entered an Order denying the State's request for these depositions of Defendants' expert witnesses, erroneously reasoning that this Court had directed that such depositions could not occur. The State submits that a fair reading of the December 7 transcript reflects that the Court did not make such an affirmative directive, but rather was merely opining based on the information available at that point that "as a practical matter" there would not be time for such depositions to occur. It is now clear that there is time available in the schedule to conduct depositions of the Defendants' experts. Accordingly, the Order is clearly erroneous in

denying the State's request to take depositions of Defendants' preliminary injunction expert witnesses.

B. Fundamental fairness dictates that, because there is time, the State be afforded depositions of Defendants' preliminary injunction expert witnesses

Given that the depositions of the State's expert witnesses will be completed on February 5, and that there are no depositions scheduled for either the week of February 11 or the week of February 25, fundamental fairness dictates that the State be afforded depositions of Defendants' preliminary injunction expert witnesses. Moreover, the docket reflects that Defendants have more than 40 attorneys working on this case. Given this fact, it is clear that Defendants' attorneys can defend the depositions of their experts without prejudicing in any way their preparations for the preliminary injunction hearing.¹

As things presently stand under the Order, the State will not know anything more about the opinions of Defendants' expert witnesses than the information that Defendants choose to disclose in their expert witnesses' disclosures -- despite the fact that there is time to depose these expert witnesses. On the other hand, by the time the preliminary injunction hearing begins, Defendants will have had the State's expert witness disclosures for more than three months and will have taken all of their depositions. This scenario created by the Order is fundamentally unfair, and gives Defendants an unwarranted tactical advantage. Fortunately, it is a situation that is easily corrected by simply allowing the State's depositions of Defendants' preliminary injunction expert witnesses to go forward beginning on February 12, 2008.

¹ Defendants' assertions that they were surprised by the State's preliminary injunction motion or its bacterial injury claim should not be credited. The fact that the State was asserting a claim for bacterial injury was disclosed with the filing of the State's complaint in June 2005. The fact that the State intended to seek a preliminary injunction was disclosed to Defendants more than a year ago. *See, e.g.*, DKT #1026 & #1027. The State began disclosing its scientific data on a rolling basis a year ago.

II. Conclusion

For the foregoing reasons the Order [DKT #1502] should be reversed, and the State should be permitted to depose Defendants' preliminary injunction expert witnesses.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina Lynn Izadi OBA #17978
Daniel P. Lennington OBA #21577
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ Richard T. Garren

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis Werner Bullock OBA #1305
James Randall Miller OBA #6214
MILLER, KEFFER & BULLOCK
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

David P. Page OBA #6852
BELL LEGAL GROUP
P. O. Box 1769

Tulsa, Ok 74101-1769
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly H. Burch, Assistant Attorney General

fc_docket@oag.state.ok.us
kelly_burch@oag.state.ok.us

J. Trevor Hammons, Assistant Attorney General
Tina Lynn Izadi, Assistant Attorney General
Daniel P. Lennington, Assistant Attorney General

trevor_hammons@oag.state.ok.us
tina_izadi@oag.state.ok.us
daniel.lennington@oag.ok.gov

M. David Riggs
Joseph P. Lennart
Richard T. Garren
Douglas A. Wilson
Sharon K. Weaver
Robert A. Nance
D. Sharon Gentry

driggs@riggsabney.com
jlennart@riggsabney.com
rgarren@riggsabney.com
doug_wilson@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

Louis Werner Bullock
James Randall Miller
MILLER, KEFFER & BULLOCK

lbullock@bullock-blakemore.com
rmiller@mkblaw.net

David P. Page
BELL LEGAL GROUP

dpage@edbelllaw.com

Frederick C. Baker
Lee M. Heath
Elizabeth C. Ward
Elizabeth Claire Xidis
William H. Narwold
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
MOTLEY RICE, LLC

fbaker@motleyrice.com
lheath@motleyrice.com
lward@motleyrice.com
cxidis@motleyrice.com
bnarwold@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrousseau@motleyrice.com
ffitzpatrick@motleyrice.com

Counsel for State of Oklahoma

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E Sanders
Edwin Stephen Williams
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker
Theresa Noble Hill

jtucker@rhodesokla.com
thill@rhodesokla.com

Colin Hampton Tucker ctucker@rhodesokla.com
Leslie Jane Southerland ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry Wayen West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Dara D. Mann dmann@faegre.com
Krisann C. Kleibacker Lee kkleee@faegre.com
Todd P. Walker twalker@faegre.com
FAEGRE & BENSON, LLP
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves jgraves@bassettlawfirm.com
Gary V Weeks gweeks@bassettlawfirm.com
Paul E. Thompson, Jr pthompson@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
BASSETT LAW FIRM

George W. Owens gwo@owenslawfirmmpc.com
Randall E. Rose rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.
Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip Hixon phixon@mhla-law.com
Craig A. Merkes cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

Sherry P. Bartley sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
Counsel for Peterson Farms, Inc.

John Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk rfunk@cwlaw.com
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

Stephen L. Jantzen
Paula M. Buchwald
Patrick M. Ryan
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Thomas C. Green
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
tgreen@sidley.com

Robert W. George
Michael R. Bond
Erin W. Thompson
KUTAK ROCK, LLP

robert.george@kutakrock.com
michael.bond@kutakrock.com
erin.thompson@kutakrock.com

Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

Jennifer Stockton Griffin
David Gregory Brown
LATHROP & GAGE LC

jgriffin@lathropgage.com

Counsel for Willow Brook Foods, Inc.

Robin S Conrad
NATIONAL CHAMBER LITIGATION CENTER

rconrad@uschamber.com

Gary S Chilton
HOLLADAY, CHILTON AND DEGIUSTI, PLLC

gchilton@hcdattorneys.com

Counsel for US Chamber of Commerce and American Tort Reform Association

D. Kenyon Williams, Jr.
Michael D. Graves
Hall, Estill, Hardwick, Gable, Golden & Nelson

kwilliams@hallestill.com
mgraves@hallestill.com

Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

Richard Ford
LeAnne Burnett

richard.ford@crowedunlevy.com
leanne.burnett@crowedunlevy.com

Crowe & Dunlevy
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General Charles.Moulton@arkansasag.gov

Also on this 4th day of February, 2008 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Cary Silverman
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

Gary V. Weeks
Bassett Law Firm
P. O. Box 3618
Fayetteville, AR 72702

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

/s/ Richard T. Garren
Richard T. Garren